No. 90-1482

Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1990

In re IONOSPHERE CLUBS, INC. and EASTERN AIR LINES, INC.,
Debtors.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO,
Petitioner,

v.

MARTIN R. SHUGRUE, JR., as CHAPTER 11 TRUSTEE for EASTERN AIR LINES, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 11 U.S.C. § 1113(f) repealed the automatic stay provisions of 11 U.S.C. § 362(a) with respect to Petitioner's action to enforce a collective bargaining agreement, where such action seeks to obtain possession of or exercise control over property of the estate or impedes the reorganization case?

2. Whether Petitioner's action to enforce a collective bargaining agreement is a "core" matter within the meaning of 28 U.S.C. § 157(b), where such action concerns the administration of Eastern's estate?

3. Whether Petitioner's action seeking to enforce a collective bargaining agreement, involving the routine application of non-bankruptcy federal law, would have been subject to mandatory withdrawal to the district court, pursuant to 28 U.S.C. § 157(d), had it been originally brought in the bankruptcy court?

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Martin R. Shugrue, Jr., chapter 11 Trustee (the "Trustee") for the estate of Eastern Air Lines, Inc. ("Eastern"), respectfully requests that this Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit seeking review of the opinion in *In re Ionosphere Clubs, Inc.*, 922 F.2d 984 (2d Cir. 1990) (the "Petition").

STATUTES INVOLVED

In addition to the statutes cited in the Petition, the Judiciary Act, 28 U.S.C. § 1254(1), is implicated in this case. The pertinent text of this statute is set forth herein on page 7.

STATEMENT OF THE CASE

Background

On March 4, 1989, Eastern's aircraft mechanics and ground service workers began a primary strike. JA 686.[1] Shortly thereafter, petitioner, the Air Line Pilots Association, International ("ALPA") and Local 553, Transportation Workers Union of America, AFL-CIO joined the pilots in a sympathy strike. JA 711. As a result, Eastern's operations were almost completely grounded. On March 9, 1989, Eastern and its affiliate, Ionosphere Clubs, Inc. ("Ionosphere"), filed voluntary petitions for relief under chapter 11, title 11, United States Code (the "Bankruptcy Code").[2] JA 420.

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1. "JA ____" refers to the Joint Appendix filed in connection with the decision below.

2. Eastern and Ionosphere continued to operate their respective businesses as debtors in possession until April 19, 1990 when the United States Bankruptcy Court for the Southern District of New York (The "Bankruptcy Court") appointed the Trustee to operate their businesses and manage their properties pursuant to sections 1106 and 1108 of the Bankruptcy Code. Pet. 4A. ("Pet. ___" refers to the Petition).

After the petition was filed, in order for Eastern to rebuild its operations, it was necessary for Eastern to hire and train replacement pilots. JA 687. Before replacement pilots could operate the aircraft, however, it was necessary for them to complete a training program. *Id.* During the period the replacement pilots were training, Eastern found it necessary to lease, on a temporary basis, aircraft, together with crews to fly those aircraft (a procedure known as "wet-leasing"), from Continental Airlines, Inc. ("Continental"). *Id.* Eastern wet-leased the aircraft in order to meet published flight schedules. *Id.* Eastern ceased wet-leasing aircraft in March, 1990.

Proceedings Below

A. The Bankruptcy Court

On September 1, 1989, ALPA commenced an action in the United States District Court for the Southern District of Florida (the "Florida Court") for an order enjoining Eastern from wet-leasing on the ground that such wet-leases violated Eastern's obligations under the Railway Labor Act (the "RLA"), 45 U.S.C. § 151, *et seq.*, and for damages relating thereto (the "Florida Action"). JA 688.

Subsequently, on September 25, 1989, Eastern commenced an adversary proceeding in the Bankruptcy Court, seeking an injunction permanently enjoining ALPA from prosecuting the Florida Action (the "Wet-Lease Lawsuit"). JA 418-28. In the complaint (the "Wet-Lease Complaint"), Eastern alleged, *inter alia*, that the commencement and continuation of the Florida Action was a violation of the automatic stay of section 362(a) or, alternatively, should be enjoined under section 105(a) of the Bankruptcy Code. JA 425. The complaint also alleged that the wet-leases were reasonably necessary in the face of the strikes and were therefore permissible under the doctrine enunciated in *Bhd. of*

Ry. & S.S. Clerks v. Florida East Coast Ry., 384 U.S. 238, 248 (1966) ("*Florida East Coast*"). JA 421. Eastern also sought a temporary restraining order and a preliminary injunction.[3] JA 537-51.

After an evidentiary hearing on October 2, 1989, the Bankruptcy Court issued its decision (the "Wet-Lease Decision") and held, *inter alia*, that Eastern's interest in the wet-lease agreements was property of Eastern's estate over which ALPA sought to exercise control through the Florida Action in direct contravention of the express provisions of section 362(a)(3) of the Bankruptcy Code. JA 698-700. The court further concluded that the Florida Action was an attempt by ALPA to interfere with the Bankruptcy Court's administration of Eastern's reorganization case and exclusive jurisdiction over property of the estate and therefore should be enjoined pursuant to section 105(a) of the Bankruptcy Code. JA 700-01. In addition, the Bankruptcy Court held that by having raised Eastern's alleged violations of section 1113 of the Bankruptcy Code, ALPA had presented an issue over which, as conceded by ALPA, the Bankruptcy Court had primary jurisdiction. JA 701-02. In connection with each of these, Judge Lifland found and concluded that the wet-lease arrangements were reasonably necessary to Eastern's continued operations in the midst of a strike and were protected by this Court's holding in *Florida East Coast*. JA 701.

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3. ALPA's implication that the Bankruptcy Court inappropriately determined, *sua sponte*, the merits of the Wet-Lease Complaint at the hearing on Eastern's motion for a preliminary injunction, *see* Pet. at 6, fn. 7, thereby depriving ALPA of the right to conduct discovery or brief its arguments, is patently false. Indeed, the Bankruptcy Court consolidated the hearing on the motion for a preliminary injunction with the trial on the Wet-Lease Complaint at *ALPA's* request. JA 674.

Previously, on July 21, 1989, ALPA filed a motion for relief from the automatic stay in order to initiate an arbitration proceeding to determine whether the affiliation of Continental and Eastern constituted a "merger," thereby triggering certain labor protective provisions ("LPPs") in the ALPA-Eastern collective bargaining agreement (the "CBA" and the "LPP Dispute," respectively). The Bankruptcy Court denied ALPA's motion on the ground that ALPA failed to show cause of precise circumstances which warranted lifting the stay (the "LPP Decision"). JA 413.

B. The District Court

On October 19, 1989, ALPA filed with the Bankruptcy Court a notice of appeal to the United States District Court for the Southern District of New York (the "District Court") from the LPP Decision (the "LPP Appeal"). Pet. 32A. On November 19, 1989, during the pendency of the LPP Appeal, ALPA filed a notice of appeal from the Wet-Lease Decision (the "Wet-Lease Appeal"). Pet. 33A. On April 10, 1990, after oral argument of the Wet-Lease Appeal, the District Court issued a consolidated decision and order with respect to both the Wet-Lease and LPP Appeals (the "District Court Order"). Pet. 6A-7A.

The District Court reversed the Wet-Lease and LPP Decisions and held that section 1113(f) of the Bankruptcy Code, enacted in 1984 in reaction to a portion of this Court's decision in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), expressly modifies sections 105(a) and 362(a) of the Bankruptcy Code to immunize arbitration and judicial proceedings to enforce collective bargaining agreements from the injunctive powers of bankruptcy courts, at least until there has been a bankruptcy court approved rejection or modification of the collective bargaining agreement. Pet. 70A-71A. The District Court based its decision on the provisions of section

1113(f) of the Bankruptcy Code, notwithstanding the fact that ALPA failed to raise this issue in either the Wet-Lease Lawsuit or the LPP Dispute.

C. The Court of Appeals

On May 3, 1990, the Trustee filed a notice of appeal of the District Court Order to the United States Court of Appeals for the Second Circuit. After oral argument, on December 21, 1990, the Second Circuit reversed that portion of the District Court Order relating to the Wet-Lease Appeal, and ruled that, contrary to the District Court Order, section 1113(f) of the Bankruptcy Code did not nullify the effect of the automatic stay extant pursuant to section 362 of the Bankruptcy Code with respect to the Bankruptcy Court's injunction of the Florida Action. Pet. 17A. In addition, the court ruled that the Bankruptcy Court's issuance of an injunction pursuant to section 105(a) of the Bankruptcy Code in furtherance of its jurisdiction did not vitiate the provisions of section 1113(f) of the Bankruptcy Code. Rather, the Second Circuit held that the mandate of section 1113(f), that no provisions of the Bankruptcy Code shall be construed to permit a debtor to unilaterally modify or terminate a collective bargaining agreement, is to be interpreted in light of the facts and circumstances of each case and not as an abstract legal concept. Pet. 12A.

Specifically, in applying section 1113(f) to the particular facts presented by the Wet-Lease Appeal, the Second Circuit determined that if ALPA had a procedural mechanism for prosecuting the Florida Action in the Bankruptcy Court, then the issuance of an injunction by the Bankruptcy Court of the Florida Action did not prevent ALPA from enforcing the CBA nor permit Eastern to unilaterally modify the CBA. Pet. 18A. Furthermore, the Second Circuit held that inasmuch as the dispute presented by the Florida Action constituted a "core

matter" within the meaning of section 157(b) of title 28, United States Code, ALPA could seek the relief requested by the Florida Action in the Bankruptcy Court. Pet. 19A-20A. The Second Circuit remanded the District Court Order for further consideration of the issues which were raised by the Wet-Lease Appeal, but not previously addressed by the District Court. Pet. 22A-23A. Indeed, a briefing schedule has already been established.

With respect to the LPP Appeal, the Second Circuit affirmed that portion of the District Court Order holding that the application of the automatic stay provisions of section 362 of the Bankruptcy Code to the LPP Dispute violated the provisions of section 1113(f) of the Bankruptcy Code. Pet. 15A-16A. The court reasoned that since the CBA provided that the issues raised by the LPP Dispute were subject to resolution by arbitration, application of the automatic stay to prevent arbitration and permit the Bankruptcy Court to adjudicate the merits of the LPP Dispute modified the arbitration clause of the CBA and, therefore, violated section 1113(f) of the Bankruptcy Code. *Id.*

REASONS FOR DENYING THE WRIT

Introduction

Contrary to ALPA's tortured analysis of the issues raised by the order below, *certiorari* should not be granted in this case. The paramount reason why this Court should deny the Petition is that it would be premature to hear the case since the order below is interlocutory and has been remanded to the District Court for further determinations. Accordingly, any determination made by the Court would merely be advisory. Not surprisingly, therefore, ALPA has failed to demonstrate any basis for its bald assertion that granting *certiorari* is appropriate "because the decision below is fundamental to the

further conduct of the case." Pet. 10, fn. 12. In addition, the relief sought by ALPA has been rendered moot due to the termination of the wet-leases, the cessation of Eastern's operations and the liquidation of its assets.

Finally, as with substantially all of the myriad of lawsuits commenced by ALPA since Eastern filed for chapter 11 protection, the overriding issue raised in the Petition is whether the appropriate venue to resolve the parties' disputes concerning the CBA is the Southern District of New York or the Southern District of Florida. While this question touches upon the scope of the Bankruptcy Court's jurisdiction under title 11 and other applicable law, it is still essentially an issue of venue, which is neither grounded in the Constitution nor an important issue warranting this Court's review. Accordingly, as demonstrated below, there is no reason for the Court to grant *certiorari*.

I. THERE IS NO REASON FOR THE COURT TO GRANT CERTIORARI BECAUSE THE INTERLOCUTORY ORDER BELOW, WHICH HAS BEEN REMANDED TO THE DISTRICT COURT, DOES NOT RAISE EXTRAORDINARY ISSUES WARRANTING THE COURT'S REVIEW UNDER 28 U.S.C. § 1254(1)

28 U.S.C. § 1254 provides, in pertinent part, as follows:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

28 U.S.C. § 1254(1) (1991). Therefore, the Court has jurisdiction to review final and interlocutory orders of federal courts of appeals whose judgments are reviewable pursuant to 28 U.S.C. § 1254(1). *See* Sup. Ct. R. 11.

As the Supreme Court Rules provide, "[a] review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10. Indeed, it is well-settled that the "court should not issue a writ of *certiorari* to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372, 384 (1893).[4] Or, stated differently, *certiorari* jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. [citations omitted] And, *except in extraordinary cases, the writ is not issued until final decree.*" *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (emphasis added).[5] Moreover, generally, federal courts do not review interlocutory orders concerning procedural matters on the basis that such review would not materially advance the

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4. *See also* Sup. Ct. R. 11 (Court will grant *certiorari* to review a case in the court of appeals before a judgment is given in such court "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court.").

5. *Accord Estelle v. Gamble*, 429 U.S. 97, 114 (1976) (Stevens, J., dissenting) (noting that the normal practice of the Court is to deny review of interlocutory orders); *Denver v. New York Trust Co.*, 229 U.S. 123, 133 (1913) ("The exceptional power to review, upon certiorari, a decision of a Circuit Court of Appeals rendered on an appeal from an interlocutory order is intended to be and is sparingly exercised.").

ultimate termination of the litigation. *In re King Memorial Hospital, Inc.*, 767 F.2d 1508, 1510 (11th Cir. 1985); *see also Graphic Communications Union v. Chicago Tribune Co.*, 779 F.2d 13, 15 (7th Cir. 1985).

For example, in *Bhd. of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327 (1967), the Court denied a petition for a writ of *certiorari* from an order of the court of appeals that had been remanded to the district court to determine whether a contempt ruling was of such magnitude to warrant retention of the fine. Citing *Hamilton-Brown*, the Court held that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Id.* at 328.

As in *Locomotive Firemen*, the decision of the court below, which has been remanded to the District Court for further determinations, is not yet ripe for review by this Court. The test is clear, a final order is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. [citations omitted]." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Inasmuch as the order below is on remand to the District Court, it does not end the litigation on the merits and a decision by this Court does not offer any possibility of ending this litigation. Specifically, even if ALPA were to prevail, which the Trustee submits is highly unlikely, and the District Court were to find that the Bankruptcy Court improperly enjoined the Florida Action in contravention of the provisions of the RLA, which is an issue on remand, any determination made by the Court would merely be advisory as the relief sought herein would be granted by the District Court. *See North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (holding federal courts do not have the power to issue advisory opinions). In addition, there is a significant possibility that the issues currently on remand to the District Court may find their way to this Court in the future. Accordingly, in furtherance of the policy of judicial economy, deliberation by this Court of

the Wet-Lease Dispute should be postponed so that all of the issues raised therein will be properly before the Court. *See Catlin v. United States*, 324 U.S. at 233-34 (discussing the federal policy against piecemeal litigation).

Moreover, ALPA has failed to present any extraordinary issues in the Petition that would require immediate review by the Court, notwithstanding the interlocutory nature of the order below. Indeed, as demonstrated below, the only issues raised in the Petition are issues of statutory construction and venue, neither of which raise Constitutional concerns or involve a conflict among the courts of appeals warranting the Court's review. Clearly, the principles of judicial economy would best be served by deferring review of the order until a final judgment has been entered by the District Court. Accordingly, there is no reason for the Court to grant *certiorari* of the interlocutory order below while a substantial portion of the litigation has been remanded to the District Court.

II. THERE IS NO REASON FOR THE COURT TO GRANT CERTIORARI BECAUSE EASTERN'S TERMINATION OF THE WET-LEASES AND THE CESSATION OF ITS OPERATIONS HAS RENDERED THE RELIEF REQUESTED BY ALPA MOOT

Article III, Section 2 of the United States Constitution, provides, in pertinent part, as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; -

> to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between a State and Citizens of another State; - between Citizens of different States; - between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const., art. III., § 2, cl. 1. Accordingly, federal courts may not decide moot or abstract questions; rather, they may hear only actual cases or controversies. *North Carolina v. Rice*, 404 U.S. at 246. "'The term 'controversies', if distinguishable at all from 'cases', is so in that it is less comprehensive than the latter, and includes only suits of a civil nature.'" *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239 (1937) (citation omitted). In determining whether a case or controversy exists, the Court has held:

> "The difference between an abstract question and a 'controversy' . . . is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

Golden v. Zwickler, 394 U.S. 103, 108 (1969) (citations omitted).

For example, in *Preiser v. Newkirk*, 422 U.S. 395 (1975), the Court found that where the relief sought by an injunction had already been provided, and it was unlikely that the harm would be repeated, no controversy existed and the injunction proceeding was moot. *Id.* at 402-03. There, a prisoner in a maximum security correctional institution sought, *inter alia*, an injunction preventing the State of New York from transferring him to any security institution without a hearing and an opportunity to be heard, as well as his return to a medium security institution. *Id.* at 397-98. After the filing of the petition for a writ of *certiorari*, but prior to the Court's consideration of same, the prisoner was transferred to a minimum security institution. *Id.* at 402.

The Court held that the issues raised by the petition were moot since the relief sought in the injunction proceeding had been granted and no real possibility of repetition existed. *Id.* at 403-04. In so ruling, the Court reasoned that:

> The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy. As the Court noted in *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971), a federal court has neither the power to render advisory opinions nor "to decide questions that cannot affect the rights of litigants in the case before them." Its judgments must resolve "'a real and substantial controversy admitting a specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Ibid.*, quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937). As the Court noted last Term, in an opinion by MR. JUSTICE BRENNAN, *Steffel v. Thompson*, 415 U.S. 452, 459 n. 10 (1974):

> "The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. . . .

Id. at 401 (citations omitted).

Likewise, in *Mills v. Green*, 159 U.S. 651 (1895), the Court held that where the relief sought could not be granted due to a change in circumstances, the action was moot. *Id.* at 653. There, the plaintiff filed a bill in equity on behalf of himself and all other citizens of the county in like circumstances, for an injunction against the supervisor of registration of the county. *Id.* at 651-52. The bill sought to secure a right to vote at the election of delegates to a state constitutional convention which was to take place on a specific date. The Circuit Court granted a temporary restraining order and a preliminary injunction to be continued pending determination of the plaintiff's request for a permanent injunction. *Id.* at 653. The defendant appealed to the Circuit Court of Appeals, which reversed the Circuit Court and remanded the case with directions to dismiss the bill. *Id.* The plaintiff appealed the order of the Circuit Court of Appeals to this Court and the appeal was entered. *Id.*

The defendant moved to dismiss the appeal on the basis, *inter alia*, that the action had been rendered moot inasmuch as the constitutional convention had been held prior to the plaintiff's appeal to the Court. *Id.* at 653. The Court held that the action was moot since no relief within the scope of the bill could be granted. *Id.* at 658. In its ruling, the Court reasoned that:

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into

> effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. . . .

Id. at 653; *see also Martin-Trigona v. Shiff*, 702 F.2d 380, 386 (2d Cir. 1983) (holding that "[t]he hallmark of a moot case or controversy is that the relief sought can no longer be given or is no longer needed.").

In the Florida Action, ALPA seeks injunctive relief enjoining Eastern from wet-leasing aircraft and crews from Continental. ALPA also seeks the recovery of damages, if any, due to such wet-leasing. However, the sole issue raised by ALPA on appeal before the District Court and the Second Circuit was the propriety of the Bankruptcy Court's injunction in light of section 1113(f) and other non-bankruptcy laws, and not the amount of ALPA's claim against Eastern in the event Eastern improperly entered into the wet-leases. Moreover, if ALPA asserts a claim for damages arising from Eastern's wet-leases, such claim will be administered by the Bankruptcy Court similar to all other claims asserted against Eastern's estate in its chapter 11 case. *See* 11 U.S.C. § 502.

The Trustee submits that the relief sought by ALPA in this proceeding before the Court has been rendered moot by Eastern's termination of its wet-leases, the cessation of its operations and the liquidation of its assets. Not only did

Eastern discontinue the action ALPA seeks to prevent by the Florida Action but, due to the cessation of its operations, there is no possibility that Eastern will enter into any wet-leases in the future. Accordingly, there is no live "controversy" raised by the Petition warranting the Court's review.[6]

Cases in which the harm asserted below is so short lived that it normally expires before review may be had are excepted from the mootness doctrine. The rationale supporting this exception is that the possibility of repetition of the type of harm asserted is very likely, yet because of the short lived nature of the order or the facts underlying the legal issues, the Court will never have an opportunity to hear a live controversy based upon the mootness doctrine. In *Merrill Lynch, Pierce,*

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6. In several cases, the Court has held that a change in circumstances which eliminates the need for injunctive relief does not moot a case so long as a " 'substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of [additional judicial relief] '" continues to exist. *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122 (1974) (citation omitted).

These cases, however, involve "controversies" which were ripe for consideration, with no issues on remand, and/or fell into the traditional exception to the doctrine of mootness as being "capable of repetition, yet evading review." Id. at 122; *see, e.g., Super Tire Eng'g, Co. v. McCorkle*, 416 U.S. 115 (1974) (holding that, although an economic strike which had given rise to this action had ended, the parties (a corporation and a union) continued to have an interest in seeking declaratory relief, inasmuch as the availability of public assistance to striking workers directly impacted upon the negotiating positions of the parties); *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968) (holding that the dissolution of an association that, along with its constituent members, is a party to an action against whom injunctive relief is sought, is not sufficient to moot a case inasmuch as to so hold would "leave '[t]he defendant . . . free to return to his old ways.'" [citations omitted] However, the court noted that "it is still open to appellees to show, on remand, that the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary." (citations omitted)).

Fenner & Smith, Inc. v. McCollum, 469 U.S. 1127 (1985), the Court explained that this exception to the mootness doctrine is limited to instances where the following elements combine:

> "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again."

Id. at 1131 (citations omitted).

For example, in *Roe v. Wade*, 410 U.S. 113 (1973), the Court noted that because the normal 266-day human gestation period is so short, the pregnancy will usually come to term before the appellate process could be completed. The Court observed that the dispute presented the "classic justification for a conclusion of nonmootness." *Id.* at 125. Another case frequently cited in connection with this exception is *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 567-69 (1980), in which a newspaper objected to a judge's order closing a trial to the public. The Court entertained the appeal notwithstanding the apparent mootness caused by the end of the trial.

The order below does not fall within this category of cases excepted from the mootness doctrine. While the legal issue of whether section 1113(f) of the Bankruptcy Code repealed the automatic stay provisions of section 362(a) with respect to lawsuits seeking to enforce rights arising under a collective bargaining agreement is capable of repetition, it will not necessarily evade review by this Court.

Accordingly, there is no reason for the Court to grant *certiorari* of the order below which has been rendered moot

due to the termination of Eastern's wet-leases and the cessation of its operations.

III. THERE IS NO REASON FOR THE COURT TO GRANT CERTIORARI BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUITS OR OTHER COMPELLING REASON WARRANTING THE COURT'S REVIEW

A. The Issue Presented By ALPA For Review Is Essentially A Question Of Venue

The dispute presented by the Wet-Lease Appeal highlights the thread of consistency throughout substantially all of the litigation between ALPA and Eastern -- a dispute over venue. Specifically, ALPA has consistently sought to have disputes resolved by the Florida Court, while Eastern, as debtor in possession, and the Trustee have asserted that the Southern District of New York, where Eastern's reorganization case has been pending for more than two years, is the appropriate venue for actions seeking to enforce the provisions of the CBA.[7] *See, e.g., Eastern Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l (In re Ionosphere Clubs, Inc. and Eastern Air Lines, Inc.)*, 89 Civ. 8250 (MBM), slip op. (S.D.N.Y. Jan. 24, 1990) (the "Bid Grievance Decision"), *reh'g denied*, 89 Civ. 8250 (S.D.N.Y. April 24, 1990), App. A[8]; *Eastern Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l (In re Ionosphere Clubs, Inc., and Eastern Air Lines, Inc.)*, 89 Civ. 0243 (MBM), slip op.

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7. Eastern initiated one action in the Florida Court in which it sought a declaratory judgment that newly hired Eastern pilots were permanent replacements for striking pilots. *See Eastern Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 744 F. Supp. 1140 (S.D. Fla. 1990), *aff'd*, 920 F.2d. 722 (11th Cir. 1991).

8. "App. ___" refers to the appendix annexed to this brief in opposition to the Petition.

(S.D.N.Y. April 30, 1990) (the "Pay Parity Decision"), App. B.

For example, the Bid Grievance Decision illustrates one of ALPA's earlier attempts to have the venue transferred to the Florida Court of a matter pending before the Bankruptcy Court with respect to a dispute regarding a provision of the CBA (the "Bid Grievance"). Specifically, ALPA moved to withdraw the reference from the Bankruptcy Court to the District Court of an adversary proceeding in which Eastern sought injunctive relief that would permit it, among other things, to retain permanent replacements hired when ALPA struck in sympathy with striking machinists. In addition, ALPA requested that the matter be transferred to the Florida Court. United States District Judge Mukasey denied ALPA's motion both to withdraw the reference and to transfer the matter to the Florida Court. App. A, 15A, 25A.

Similarly, the issues presented by ALPA in the Wet-Lease Appeal, whether section 1113(f) of the Bankruptcy Code prevented the Bankruptcy Court from enjoining the Florida Action and whether Eastern's practice of wet-leasing was reasonably necessary, was just another attempt to seek to have a dispute under the CBA adjudicated by the Florida Court. Accordingly, ALPA is seeking a writ of *certiorari* merely to have this Court address an issue of venue, which is neither a Constitutional issue nor an important issue warranting this Court's review.

B. The Second Circuit's Decision That Application Of The Automatic Stay To Actions Or Proceedings To Enforce Claims Arising Under Collective Bargaining Agreements Which Seek To Obtain Possession Of Or Exercise Control Over Property Of The Estate Or Which Would Impede The Reorganization Case Is Not In Conflict With Any Other Circuit Court Decision

In determining whether to grant a petition for a writ of *certiorari*, this Court has customarily required that the decision subject to review be in direct conflict with a decision of another court of appeals. The Court has, on occasion, dismissed a writ of *certiorari* as improvidently granted where it has later been determined that the alleged conflict between decisions of the courts of appeals does not in fact exist. *See, e.g., Wisconsin Elec. Co. v. Dunmore Co.*, 282 U.S. 813 (1931); *Keller v. Adams-Campbell Co.*, 264 U.S. 314 (1924); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923). Moreover, Rule 10 of the Supreme Court Rules specifically provides that one reason for granting *certiorari* is "[w]hen a United States court of appeals has rendered a decision *in conflict* with the decision of another United States court of appeals on the same matter. . . . Sup. Ct. R. 10 (emphasis added).

Extensive research has not revealed any opinion by any other court of appeals which addresses the issue presented by the Wet-Lease Appeal. Indeed, ALPA does not cite a single circuit or district court decision which is at odds with the decision below. Accordingly, review by this Court of the issue presented by the Wet-Lease Appeal is unwarranted since it is not clear whether any other federal court of appeals will interpret the interplay between sections 1113(f) and 362(a) of the Bankruptcy Code differently from the decision below.

1. The Interpretation Of 28 U.S.C.§ 157(b) Is Not Relevant To The Issue Presented By The Wet-Lease Appeal

In an attempt to construe the decision below in such a manner as to create a conflict with other circuit court decisions, ALPA erroneously focuses on the seeming conflict between *dictum* in the decision below regarding the Second Circuit's determination that the Wet-Lease Dispute is a "core matter" pursuant to section 157(b) of title 28, United States Code, from other circuit court decisions which have adopted a more narrow interpretation of the scope of the bankruptcy court's "core matter" jurisdiction. *See Stikel v. United States*, 76 S.Ct. 1067, 1068 (1956) (holding that dictum in lower court opinion was not reviewable by the Supreme Court).

The court below unnecessarily addressed the issue of whether the Wet-Lease Dispute was a "core matter" presumably in order to determine whether the application of section 362(a) of the Bankruptcy Code to the Florida Action would deny ALPA a forum for seeking the enforcement of the CBA. The Second Circuit reasoned that if the Florida Action did not present the Bankruptcy Court with a "core matter," then enjoining the Florida Action would deny ALPA a forum to seek the resolution of its complaint in violation of the provisions of sections 1113(f). Pet. 18A.

Even if the Florida Action was not a "core matter," however, the issues raised by the action would still be subject to the jurisdiction of the District Court pursuant to section 1334(b) of title 28, United States Code, which provides that the "district court shall have original, but not exclusive jurisdiction of all civil proceedings . . . related to cases under title 11." 28 U.S.C. § 1334(b) (1991). Therefore, even though a case under title 11 may be referred to the bankruptcy court, which is merely a unit of the district court,

pursuant to section 157(a) of title 28, United States Code, the district court retains jurisdiction over the proceeding. Accordingly, a determination of whether the Florida Action is a "core" or "non-core" proceeding is completely irrelevant to the issue of whether the merits of the Florida Action should be determined in the Southern District of New York or before the Florida Court. If ALPA were correct that the Florida Action is a "non-core" matter, which the Trustee submits it is not, the only effect would be that the District Court, as opposed to the Bankruptcy Court, would have jurisdiction to issue a final determination on the matter.

Furthermore, ALPA did not object to the issuance of a permanent injunction of the Florida Action in the Bankruptcy Court on the ground that it presented "non-core" issues. Nor did ALPA raise the issue in the Wet-Lease Appeal to the District Court. Clearly, ALPA did not raise this issue because even if it had been raised successfully, venue would still lie in the Southern District of New York. Accordingly, even if the *dictum* in the decision below with respect to the scope of the bankruptcy court's "core matter" jurisdiction were in direct conflict with other circuit decisions cited by ALPA, which the Trustee submits it is not, the issue presented by the decision below is not affected by the "core"/"non-core" distinction, and therefore, should not be considered in determining whether to grant the Petition.

Moreover, whether or not the Wet-Lease Lawsuit is a "core" proceeding is also irrelevant because ALPA repeatedly submitted itself to the jurisdiction of the Bankruptcy Court. Not only did ALPA appear before the Bankruptcy Court in connection with the consolidated hearing on Eastern's motion for a preliminary injunction and complaint for a permanent injunction of the Florida Action, but, since the inception of Eastern's chapter 11 case, ALPA has actively participated in Eastern's case before the Bankruptcy Court, both individually,

and as a member of the unsecured creditors' committee for Eastern. In addition, ALPA has filed a proof of claim in the Bankruptcy Court against Eastern's estate. Thus, the Bankruptcy Court was empowered to finally decide the issue presented by the Wet-Lease Lawsuit, even if it was not a "core" proceeding.[9] Therefore, any controversy concerning the appropriate venue for a determination of the dispute underlying the Florida Action has been rendered moot.

Notwithstanding the foregoing, the Second Circuit's interpretation of the scope of the bankruptcy court's "core matter" jurisdiction in the decision below and in *Ben Cooper* is not in direct conflict with *In re Wood*, 825 F.2d 90 (5th Cir. 1987), or other circuit cases which adopt the more limited interpretation of the scope of "core matter" jurisdiction

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9. *See Guardian Mortgage Investors v. Unofficial Noteholders - Debentureholders Creditors Committee*, 607 F.2d 1020, 1024 (2d Cir. 1979) ("since the Committee has clearly subjected itself to the jurisdiction of the bankruptcy court, there can be no doubt of that court's ability to afford Guardian whatever relief it deserves"); *see also Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782, 2784-99 (1989) (filing of a claim constitutes submission to the equitable power of the bankruptcy court); *Ben Cooper, Inc. v. Insurance Company of the State of Pennsylvania (In re Ben Cooper, Inc.)*, 896 F.2d 1394 (2d Cir), *cert. denied*, 110 S.Ct. 3269 (1990) ("*Ben Cooper*") (bankruptcy jurisdiction under Bankruptcy Amendments and Federal Judgeship Act of 1984 should be construed as broadly as possible within constitutional restraints); *In re Manville Forest Prods. Corp.*, 896 F.2d 1384 (2d Cir. 1990) (bankruptcy court has jurisdiction to consider all matters affecting the administration of the estate); *In re Fin. News Network, Inc.*, No. M-47 (MEL), slip op. (S.D.N.Y. April 18, 1991) (the Federal Trade Commission submitted itself to the jurisdiction of the bankruptcy court based upon the extent of its participation in the contested matter and the case), App. C.

adopted by the United States Court of Appeals for the Fifth Circuit.[10]

Unlike *Wood*, in which the subject matter of the dispute presented was a state law claim which related to the division of ownership of a medical clinic, and which did not have an impact on the operation of the clinic or the administration of the estate, the issues presented in the Florida Action went to the core of Eastern's operations. Indeed, the Florida Action involved the enforcement of the CBA which, pursuant to section 1113 of the Bankruptcy Code, was binding on Eastern's chapter 11 estate. If Eastern were going to continue operations in the hopes of reorganizing, interpretation of the CBA was clearly a matter concerning the administration of Eastern's chapter 11 estate pursuant to section 157(b) of title 28, United States Code. None of the cases cited by ALPA involve a dispute which affected the debtor's ability to operate its business.

Accordingly, the determination below that the Florida Action presented a "core matter" is not in *direct* conflict with *Wood* or its progeny, and there is no reason for the Court to grant *certiorari* of the order below.

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10. *See Barnett v. Stern*, 909 F.2d 973 (7th Cir. 1990); *Gouer v. Farmers Home Admin. (In re Davis)*, 899 F.2d 1136 (11th Cir.), *cert. denied*, 111 S.Ct. 510 (1990); *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183 (5th Cir. 1990); *Hays v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149 (3d Cir. 1989).

2. The Second Circuit's Determination Regarding Withdrawal Of The Reference Pursuant to 28 U.S.C. § 157(d) Is Not Relevant To The Issue Presented By The Wet-Lease Appeal

As with the distinction between "core" and "non-core" matters, whether the District Court should have withdrawn the reference of the Wet-Lease Lawsuit is irrelevant to the issue presented by the Wet-Lease Appeal. ALPA neither sought to withdraw the reference of the Wet-Lease Lawsuit, nor even raised the issue.[11] Moreover, even assuming *arguendo* that the reference were withdrawn, the venue of the Wet-Lease Lawsuit would still properly have been in the Southern District of New York and not the Florida Court. As stated, the dispute raised by the Wet-Lease Appeal is whether the Florida Court or the Southern District of New York should resolve the Wet-Lease Lawsuit. Withdrawal of the reference would not have resolved this dispute.

The fact that withdrawal of the reference would not have resolved ALPA's efforts to have the Wet-Lease Lawsuit adjudicated by the Florida Court, indicates why ALPA failed to raise this issue below. ALPA only raises this issue in the Petition in an effort to find some basis for the issuance of such an extraordinary writ. Accordingly, whether or not a conflict exists among the lower courts concerning the circumstances

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11. Section 157(d) of title 28, United States Code, provides, in pertinent part:

> The district court shall, on *timely* motion of a party, so withdraw a proceeding if...

As stated, ALPA first raised the issue of whether the reference of the Wet-Lease Lawsuit should have been withdrawn only after the court below rendered its decision. Raising this issue at the present juncture can hardly be considered timely.

upon which the reference should be withdrawn from the bankruptcy court to the district court is completely irrelevant to the controversy addressed by the decision below. Clearly, under these circumstances, any determination by the Court regarding this issue would result in the issuance of an advisory opinion. Accordingly, there is no reason for the Court to grant *certiorari*.

C. The Wet-Lease Appeal Does Not Present Any Issues Of Compelling Importance Warranting This Court's Review

As stated, the dispute herein is solely an issue of the appropriate venue in which to litigate claims arising under the CBA. Although questions of venue often involve considerations of judicial economy and convenience, it can hardly be said that the issue presented by this appeal rises to the level of Constitutional importance justifying review by the Court in the absence of other compelling reasons to grant the Petition.

Moreover, contrary to ALPA's assertions, the decision below is not in conflict with section 1113(f) of the Bankruptcy Code. Indeed, the Second Circuit's affirmance of the Bankruptcy Court's stay of the Florida Action illustrates that the provisions of sections 362(a) and 1113(f) can be interpreted to give each provision its intended effect.

1. The Automatic Stay and The Bankruptcy Court's Other Injunctive Powers Further The Policy of Centralization of Dispute Resolution

The automatic stay is "one of the most fundamental protections provided [to the debtor] by the bankruptcy laws." *Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection*, 474 U.S. 494, 503 (1986) (quoting S. Rep. No. 95-989, 95th Cong., 2d Sess., 340 (1977)); *see In re Johns-Manville Corp.*,

57 Bankr. 680, 685 (Bankr. S.D.N.Y. 1986). As the court below recognized, the automatic stay promotes two purposes of the Bankruptcy Code. "First, the automatic stay 'provides the debtor with 'a breathing spell from his creditors.'" Pet. 8A (citation omitted). "In addition, the automatic stay allows the bankruptcy court to centralize all disputes concerning property of the debtor's estate in the bankruptcy court so that reorganization can proceed efficiently, unimpeded by uncoordinated proceedings in other arenas." *Id.*

2. Section 1113 Of The Bankruptcy Code Was Adopted To Ensure That Collective Bargaining Agreements Would Remain In Effect Until The Procedural And Substantive Standards For Rejection Have Been Met

The court below also correctly held that section 1113 of the Bankruptcy Code was enacted as a response to the Court's holding in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984). In *Bildisco*, the Court held "that the filing of a petition in bankruptcy rendered collective bargaining agreements unenforceable." Pet. 8. In order to reverse the effect of *Bildisco*, Congress enacted section 1113 of the Bankruptcy Code, which established certain procedural and substantive standards which have to be satisfied prior to seeking the modification or termination of a collective bargaining agreement. Pet. 9A.

To ensure that these requirements are not circumvented, Congress enacted section 1113(f) of the Bankruptcy Code which provides:

> No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining

> agreement prior to compliance with the provisions of this section.

11 U.S.C. § 1113(f) (1991). The court below correctly determined that, while Congress did intend to prevent debtors from escaping their obligations under collective bargaining agreements prior to satisfying the standards of section 1113, it did not intend to "preclude application of the automatic stay to any dispute involving a collective bargaining agreement. . . ." Pet. 11A.

3. The Decision Below Is Consistent With The Provisions of Both Section 1113 and Section 362 Of The Bankruptcy Code

The court below correctly interpreted the provisions of section 1113(f) of the Bankruptcy Code consistent with accepted rules of statutory construction by applying the language of section 1113(f) literally to the circumstances presented by the Wet-Lease Lawsuit. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno,* 110 S.Ct. 1570, 1575 (1990) (holding absent clearly expressed legislative intent to the contrary, the statutory language is conclusive); *California Chieftan v. Air Vermont, Inc. (In re Air Vermont, Inc.),* 761 F.2d 130, 134 (2d Cir. 1985) (where statute is unambiguous on its face, the statute's literal meaning must be applied "unless there is something to make plain the intent of Congress that the letter of the statute is not going to prevail."). In conducting an analysis of the statute, the Second Circuit held that the plain language of section 1113(f) did not require the repeal of the automatic stay with respect to *all* actions seeking the enforcement of a collective bargaining agreement. In so holding, the court below complied with this Court's recent ruling in *West Virginia Univ. Hosp., Inc. v. Case,* No. 89-994 (S.Ct. March 19, 1991) (LEXIS, Gen Fed Library,

Cases) (1991 U.S. WL34485), in which the Court directed that:

> As we have observed before, however, the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone. *See Rodriquez v. United States*, 480 U.S. 522, 525-526 (1987). The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous -- that has a clearly accepted meaning in both legislative and judicial practice -- we do not permit it to be expanded or contracted by legislators or committee during the course of the enactment process. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, 'the sole function of the court is to enforce it according to its terms.'"), quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

Clearly, section 1113(f) does *not* evidence an intent to repeal the provisions of section 362 of the Bankruptcy Code; therefore, the court below was correct in reversing the District Court Order which unnecessarily read a sweeping repeal of the automatic stay provisions of section 362 of the Bankruptcy Code.

In an attempt to reconcile any apparent conflict which may arise in certain circumstances between the provisions of section 1113(f) and section 362 of the Bankruptcy Code, the court below correctly identified its duty to interpret sections of statutes in such a way as to give full force and effect to each provision and to the legislative policies of each. Pet. 13A; *see*

Strobl v. New York Mercantile Exch., 768 F.2d 22 (2d Cir.), *cert. denied*, 474 U.S. 1006 (1985).

As stated, section 362(a) of the Bankruptcy Code provides for the automatic stay of the commencement or continuation of any action against property of a debtor's estate. This provision allows for the bankruptcy court to become the central forum for disputes concerning the administration of the chapter 11 estate. *In re Colin, Hochstein Co.*, 41 Bankr. 322, 325 (Bankr. S.D.N.Y. 1984).

Section 1113, on the other hand, establishes the requirements which must be satisfied before a collective bargaining agreement can be modified or rejected. *Century Brass Prods., Inc. v. Int'l Union, United Auto. Aerospace and Agric. Workers (In re Century Brass Prods., Inc.)*, 795 F.2d 265, 272 (2d Cir.), *cert. denied*, 479 U.S. 949 (1986). However, section 1113 is silent as to the proper forum for the enforcement of rights under collective bargaining agreements. Accordingly, the court below interpreted section 1113(f) to preclude the application of section 362(a) in those instances where such application would prevent a union from enforcing its rights under a collective bargaining agreement. Pet. 14A. In adopting the foregoing interpretation, the court below specifically limited the number of instances in which the application of section 1113(f) would require the repeal of section 362 of the Bankruptcy Code.

Accordingly, with respect to the Wet-Lease Lawsuit, the court below correctly held that since the Florida Action was a "core matter" and ALPA could seek relief in the Bankruptcy Court, the injunction of the Florida Action under section 362 did not conflict with the provisions of section 1113(f). Pet. 17A. Therefore, inasmuch as the court below correctly interpreted Congressional intent behind the enactment of section 1113(f) of the Bankruptcy Code, and such

interpretation is not in conflict with the decisions of any other circuit courts of appeals, there is no reason for the Court to grant *certiorari* of the Petition.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion and Order of the United States District Court Southern District of New York

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

89 Civ. 8250 (MBM)

In re: Case Nos. 89 B 10448 (BRL)
89 B 10449 (BRL)

IONOSPHERE CLUBS, INC. and
EASTERN AIRLINES, INC.,

Debtors.

EASTERN AIRLINES, INC.

Plaintiff,

-against-

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, EASTERN AIR LINE MASTER EXECUTIVE COUNCIL,

Defendant.

ADV. PRO. No. 89-6590A

Appendix-A Opinion and Order of the United States District Court Southern District of New York

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Opinion and Order of the Court

MICHAEL B. MUKASEY, U.S.D.J.

The Air Line Pilots Association, International ("ALPA"), which represents certain current and former pilots employed by Eastern Airlines, has moved to withdraw from the Bankruptcy Court to the District Court an adversary proceeding filed by Eastern, and has asked that that proceeding be transferred to the U.S. District Court for the Southern District of Florida. To accomplish the withdrawal, ALPA invokes 28 U.S.C. § 157(d), which permits a bankruptcy court proceeding to be withdrawn to the district

court "in whole or in part . . . for cause shown," and requires such withdrawal "if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." To justify the transfer, ALPA cites factually related litigation commenced by Eastern in the Southern District of Florida, and relies on 28 U.S.C. § 1404(a), which authorizes transfer of a case "[f]or the convenience of parties and witnesses, in the interest of justice . . . to any other district . . . where it might have been brought."

In the adversary proceeding, Eastern has sought declaratory and injunctive relief that would permit Eastern to retain permanent replacements hired when ALPA struck in sympathy with striking machinists, to continue in effect work rules that arguably would delay the rehiring of certain former strikers, and to do both without submitting the underlying issues to arbitration otherwise mandated by he Railway Labor Act ("RLA"). ALPA, by contrast, suggests a congeries of issues under the RLA and the Norris-La Guardia Act ("NLGA") that allegedly require the attention of a district court and justify withdrawal of Eastern's proceeding from the Bankruptcy Court. However, ALPA seeks to have most of the factual claims in Eastern's complaint resolved ultimately not by a district court, either here or in Florida, but by a System Board of Adjustment arbitrator appointed pursuant to the RLA.

For the reasons set forth below, the motion to withdraw is granted only to the extent that questions of law are discussed and decided herein, the motion to transfer is denied, and

following such withdrawal the remainder of the proceeding is remanded to the bankruptcy court for decision.[1]

I.

A. The ALPA Strike

On March 4, 1989 Eastern's aircraft mechanics and ground service workers represented by the International Association of Machinists ("IAM") began a primary strike. ALPA agreed that its members would honor the IAM picket lines and strike in sympathy with the IAM. Eastern, beset by these and other problems, filed a petition in the Bankruptcy Court for this District on March 9, 1989 under Chapter 11 of the Bankruptcy Code. In an effort to continue operations and maintain flight schedules, Eastern hired permanent replacements for many of the striking pilots. Eastern's contract with ALPA, however, remained in effect. Among the provisions of that contract are those governing seniority and the procedure for assigning pilots to particular flights. Seniority rights are established by Section 18 of the contract, which provides also that seniority governs promotion, retention, reassignment and recall of pilots following layoff. (Linsey Aff. Exh. A1 [hereinafter "Contract"] § 18 C). In essence, the assignment procedure allows pilots to bid on flights based on domicile (airport location) and seniority, such

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1. ALPA has suggested that if any part of the proceeding is to be withdrawn, it must all be withdrawn and decided in the District Court. The language of § 157(d) permits a district court to withdraw a proceeding "in whole or in part" when cause is shown and requires that the district court "so withdraw" the proceeding (*i.e.*, in whole or in part) when statutes outside the Bankruptcy Code must be considered.

that pilots with greater seniority at each domicile are permitted to choose the flights they preferred and thereby to hold "category positions," assuming they are qualified to fly the categories of equipment used on those flights. (Contract, § 27) Vacancies at domiciles within the system are filled periodically by system-wide bids, also determined by seniority and equipment qualification. (Contract, § 28) A letter agreement annexed to the contract permits Eastern to use "flow bids" to adjust crew assignments between periodic system-wide bids pursuant to § 28 of the contract. (Document 28, dated July 30, 1980).

Eastern issued a system-wide bid on May 3, 1989, effective August 1, 1989, open to "pilots on active status (working, in training or on authorized leave) as of the bid deadline" and to a "striking pilot who has made an unconditional offer to return to work by the bid deadline . . . if there is a vacancy available at the time of the award, i.e. if his numerical position on the recall list is such that, when added to the total number of working pilots (including permanent replacements) and pilots above him on the recall list, he is within the total number of pilots required for the bid." (Linsey Aff. Exh. A2) According to ALPA, this bid purported to eliminate all pre-strike category positions held by striking pilots as of August 1, 1989. (Linsey Aff. ¶ 11) Eastern issued further such system-wide bids on July 19, 1989, effective October 1, 1989, covering more than 450 vacancies caused by an expansion of operations (Linsey Aff. Exh. A3), and on November 6, 1989, effective March 2, 1990, covering more than 400 further vacancies. (Linsey Aff. Exh. A4) In addition, on October 13, 1989 Eastern issued a "flow bid" under Document 28, effective January 1, 1990, to cover 27 additional vacancies. (Linsey Aff. Exh. A5)

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Despite their participation in the sympathy strike, Eastern pilots continued to submit bids for future flights. When Eastern refused to honor those bids, ALPA filed grievances on June 8 (Linsey Aff Exh. A6, relating to the May 3, bid), August 4 (Linsey Aff. Exh. A7, relating to the July 19 bid), November 17 (Linsey Aff. Exh. A8, relating to the November 6 bid) and December 8 (Linsey Aff. Exh. A9, relating to the October 13 "flow bid") In addition, ALPA filed on September 11, 1989 a grievance relating to Eastern's refusal to honor the seniority of pilots who had participated in the sympathy strike and then returned to work to find their positions had been filled by newly hired permanent replacements. (Linsey Aff. Exh. A10)

The grievances relating to the first two system-wide bids, of June 8 and August 4, and to Eastern's alleged denial of seniority rights to returning former strikers, were heard within Eastern and yielded results unfavorable to ALPA. (Linsey Aff. Exhs. A11, A12, A13) The ALPA-Eastern collective bargaining agreement is governed by the RLA, made applicable to air carriers by 45 U.S.C. § 181; grievances remaining unresolved after the initial steps of the grievance process are decided by the ALPA-Eastern System Board of Adjustment established pursuant to the RLA -- that is, by arbitration. 45 U.S.C. § 184.

On November 22, 1989 ALPA notified Eastern by letter that it was ending its sympathy strike. By then, Eastern and ALPA has been engaged in legal maneuvering for months. To a somewhat greater extent than is strictly relevant, but in order to convey the flavor, that maneuvering may be summarized as follows. In March 1989, after the Chapter 11 filing, Eastern began a lawsuit in the Southern District of Florida seeking a

declaratory judgment validating work rule changes that expanded the number of hours pilots were permitted to fly. (Linsey Aff. Exh. C) Such rule changes would allow the airline to use fewer pilots. Apparently displeased with the judge assigned by lot to the case, Eastern never pursued that action and it was dismissed *sua sponte* on July 17, 1989. (Linsey All. Exhs. C, D) Eastern moved in the bankruptcy Court in June to reject its contract with ALPA pursuant to 11 U.S.C. § 1113, but thereafter withdrew that motion. (Linsey Aff. Exh. E) On August 11, 1989, Eastern filed yet another lawsuit in the Southern District of Florida seeking a declaratory judgment that its permanent replacement of strikers was lawful. That case was not assigned to the same judge as the first had been. (Linsey Aff. Exh. F) On September 1, 1989 ALPA sued in the Southern District of Florida to stop Eastern from leasing planes and crews from other airlines ("wet leasing"), a lawsuit enjoined by the Bankruptcy Court on October 4, 1989 as a violation of the automatic stay provisions of 11 U.S.C. § 362. (Eastern App. Exh. 6A) This was the point to which the parties' thrust and parry had progressed by the time ALPA decided to call off the sympathy strike.

B. Events Following the Strike

When ALPA members sought to return to work and found that Eastern had filled their positions by hiring replacements who had been promised permanent employment, the procedural swordplay began in ernest. On November 24, 1989 Eastern moved to amend its complaint in the Southern District of Florida to include all the issues raised in what would later become the Bankruptcy Court complaint that is subject of this proceeding, seeking a declaration that its bids

and hiring of permanent replacements for striking ALPA pilots were proper. (Linsey Aff. Exh. G) On December 8, 1989 ALPA sought to consolidate before the System Board of Adjustment arbitrator, and to expedite for hearing, all the grievances it had filed with respect to the bids and Eastern's hiring of permanent replacements, including both those that had been heard initially within Eastern and those that had not yet reached that procedural step. (Linsey Aff. Exh. A19)

On December 11, 1989 Eastern filed in Bankruptcy Court the adversary proceeding at issue here, seeking to place before the Bankruptcy Court issues ALPA would have preferred to arbitrate before the System Board of Adjustment under the RLA, and secured a temporary restraining order halting the proposed arbitration and scheduling a hearing for December 15. The same day, ALPA notified the District Court in Florida that it consented to the filing of Eastern's proposed amended complaint, and that it planned to file counterclaims that would put in issue not only Eastern's bids and hiring of permanent replacements for striking ALPA pilots, but also Eastern's alleged improper refusal to bargain with ALPA and alleged attempt to undermine ALPA's status as bargaining agent. (Linsey Aff. Exh. J) That maneuver apparently was intended to place before the Florida federal court the issues Eastern was seeking to litigate in the New York Bankruptcy Court (which in turn were largely the issues ALPA was seeking to litigate before the System Board of Adjustment), or at least to present to the Florida court the question of whether those issues would be litigated before an arbitrator under the RLA or a bankruptcy judge. Here ALPA appears to have been motivated in its choice of forum by both the earlier Bankruptcy Court injunction against its Florida action to challenge wet leasing, and also by a November 29, 1989

finding of the Bankruptcy Court that ALPA and IAM had participated in widespread unlawful harassment of Eastern employees. (Eastern App. Exh. 7 at 105-06)

The next day, December 12, the Bankruptcy Court having enjoined the arbitration, Eastern moved in the Southern District of Florida to withdraw its motion to amend the complaint in that Court (Linsey Aff. ¶ 23 and Exh I), thereby seeking to head off ALPA's proposed counterclaims and to avoid placing the grievance and work rule issues before the Florida court. Not to be outdone, ALPA would later seek an emergency hearing before the Florida court to consider its application to file counterclaims, apparently so as to abort Eastern's attempt to withdraw the motion to amend the complaint. (ALPA App. to Reply Mem., Exh. 3)

On December 13, ALPA filed its application to withdraw Eastern's adversary proceeding from the Bankruptcy Court and this Court stayed the December 15 hearing. Thereafter, following oral argument, this Court on December 29 amended its earlier stay to permit the Bankruptcy Court to determine the applicability of the automatic stay provisions in Bankruptcy Code § 362(a)(3) to the grievances commenced by ALPA.

C. Eastern's Bankruptcy Court Complaint

Eastern's complaint in the Bankruptcy Court contains five separate claims in relief, denominated counts. The first four counts raise issues that are also the subject of ALPA grievances. In Count I, Eastern asks the Bankruptcy Court to bar ALPA from pursuing the pending grievances anywhere but in that Court. In Count II, Eastern requests simply a stay of the pending grievances. In Count III, Eastern asks the

Bankruptcy Court to resolve those grievances in Eastern's favor. The grievances, it will be recalled, relate to Eastern's refusal both to honor bids from striking ALPA pilots and to recognize the seniority of returning strikers in preference to replacement pilots hired during the strike.

Count IV of Eastern's Bankruptcy Court complaint seeks a declaratory judgment that no active pilot need be displaced by a returning striker. In this Court, Eastern does not purport to seek relief because of a pending arbitration. Instead, Eastern claims that ALPA expressed in its November 22, 1989 letter to Eastern the intent to demand such displacement of active pilots when the seniority of returning strikers would require it. But whether the Contract requires such displacement is the same issue raised by ALPA's September 11, 1989 grievance discussed in connection with Count III, and should be resolved the same way.

Count V is not the subject of any arbitration demand by ALPA. In that count, Eastern seeks a declaration that it may continue in effect temporary work rules that lengthened the hours of pilots, implemented during the strike, until either sufficient returning strikers have been retrained or Eastern's schedule has been reduced, or some combination of both, to the point where pre-strike work rules may be restored.

Eastern has alleged, and ALPA does not appear to deny, that the stakes underlying the dispute are potentially so costly to Eastern as to threaten its ability to continue operations. (Complaint, ¶¶ 27-29) At issue is whether Eastern will have to incur millions of dollars in retraining costs for more than 1,800 returning pilots, and possibly incur substantial liability to replacements hired with the promise of permanent

employment. Eastern has argued, and ALPA has agreed, that the pendency of this controversy interferes with Eastern's ability to offer a reorganization plan and casts doubt on whether such a plan can go forward successfully. (12/28/89 Tr. 5-6, 22-23)

II.

Under 28 U.S.C. § 157(d), withdrawal of a proceeding from the bankruptcy Court is mandatory if "resolution of the proceeding requires consideration of both title 11 and other laws . . . regulating organizations or activities affecting interstate commerce." That section was part of the legislation enacted in 1984 following the Supreme Court decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), holding that insofar as Section 241(a) of the Bankruptcy Reform Act of 1978 permitted a debtor in possession to sue in bankruptcy court for breach of contract, that section unconstitutionally denied defendant in that case the right to have the controversy heard by an Article III judge. "Section 157(d) serves two functions: it is an attempt to insulate the 1984 legislation against successful constitutional attack, and to single out a special type of adversary proceeding for separate treatment." 1 L. King, *Collier on Bankruptcy*, ¶ 3.01 at 3-62 (1889 ed.). The same commentator has noted that to the extent motivated by constitutional concerns arising from *Marathon*, the statute literally read may be overly broad. *Id.*

The purpose of § 157(d) is to assure that an Article III judge decides issues calling for more than routine application of statutes outside the Bankruptcy Code. 1 L. King, *Collier on Bankruptcy*, ¶ 3.01 at 3-66-67 (15th ed. 1989). In order to

preserve the purposes and structure of the Bankruptcy Code, courts have heeded the observation during the Congressional debates that it "was not intended to become 'an escape hatch through which most bankruptcy matters will be removed to the district court' . . . and . . . that district courts 'should not allow a party to use this provision to require withdrawal where such laws are not material to the resolution of the proceeding' . . . ." *In re White Motor Corp.*, 42 B.R. 693, 704 (N.D. Ohio 1984), *quoting* 130 Cong. Rec. H1850 (daily ed. March 21, 1984) and 130 Cong. Rec. S6081 (daily ed. June 19, 1984). Accordingly, the section has been read narrowly. Withdrawal has been granted when substantial interpretation of federal statutes other than the Bankruptcy Code has been found necessary, *e.g.*, *In re Chateaugay Corp.*, 86 B.R. 33 (S.D.N.Y. 1987), but denied when only routine application of established legal standards is called for, *In re Ionosphere Clubs, Inc.*, 103 B.R. 416, 420 (S.D.N.Y. 1989), or when it is not clear that application and interpretation of statutes other than the Bankruptcy Code will be necessary to resolve the case. *In re White Motor Corp.*, *supra.*

ALPA insists that substantial interpretation of statutes outside the Bankruptcy Code is necessary to resolve this case because of a wide variety of unsettled issues the union hypothesizes. As discussed below in part IV of this opinion, however, those issues either are not so novel as ALPA suggests, or they can be resolved at this stage in such a fashion as to permit the Bankruptcy Court to resolve the factual issues in the case. Further, ALPA is seeking to have the factual issues underlying Counts I through IV of Eastern's complaint decided not by an Article III judge but by a statutorily designated arbitrator under the RLA. As to those issues that ALPA seeks to arbitrate, the only question that

arguably should be decided by an Article III judge is who should resolve those issues, not how they should be resolved. That question turns on whether the policy underlying the dispute resolution provisions of the RLA requires that an arbitrator rather than a bankruptcy judge resolve these issues in this case. As set forth below in part V of this opinion, the RLA procedures here must yield to those prescribed by the Bankruptcy Code.

III.

ALPA would have this Court follow its arguments closely enough to discern questions calling for substantial interpretation of federal statutes outside the Bankruptcy Code, but not so closely as to interpret those statutes and answer those questions. Rather, as soon as such questions are perceived, through the mist as it were, ALPA would have this Court back away and transfer the case to the Southern District of Florida. That involves a potentially cumbersome analysis: decide first whether questions warranting withdrawal are present; then, having taken care to define but not answer those questions, determine whether a transfer is necessary; if no transfer is necessary, return to answer the questions that prompted the withdrawal.

It seems simpler to deal first with the transfer motion. Assuming that an Article III judge must decide any issues in this case, should the Article III judge be one in this Court or in the Southern District of Florida? A transfer under 28 U.S.C. § 1404(a) is proper only when necessary to serve "the convenience of parties and witnesses, in the interest of justice." ALPA has offered no considerations of convenience that recommend a transfer, nor could it. Eastern's bankruptcy

is being administered in this District, and it would be a substantial inconvenience to all concerned for this matter to be referred to the Southern District of Florida, which from all appearances has not dealt with any substantive dispute between the parties but has been employed by the parties instead merely as the site of intermittent diversions. ALPA seems to complain that Eastern has staged more of these diversions than ALPA itself, and did so earlier than ALPA, and therefore should not be heard to complain about litigating in the Southern District of Florida. Which is to say, the "interest of justice" ALPA has in mind is poetic justice. The statute, however, was meant to serve more prosaic ends such as reducing inconvenience and expense, *Van Dusen* v. *Barrack*, 376 U.S. 612, 616 (1964), none of which would be advanced in this case by a transfer.[2] Accordingly, the transfer motion is denied.

IV.

We can now return to the questions at hand -- namely, whether the bankruptcy judge or an RLA arbitrator should resolve those factual issues in Counts I through IV of the

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2. Besides, the procedural shenanigans were the work of the lawyers, not the client. If poetic justice is the goal, it can be achieved with near surgical precision before the bankruptcy court of Judge Lifland, who will determine the fees to be collected by those lawyers. Bankruptcy Rule 219. In addition, the Examiner Judge Lifland has appointed pursuant to 11 U.S.C. § 1104, David I Shapiro, Esq., who has functioned as a mediator in an attempt to help Eastern's reorganization effort succeed, has told this court both in writing and orally that he will oppose Eastern's attempt to stay the ALPA arbitrations unless Eastern stops litigating labor related issues piecemeal, abandons its Florida action and agrees to litigate all labor related issues before the Bankruptcy Court. (12/28/89 Tr. 51)

Eastern complaint, which have been the subject of ALPA grievances, and whether the bankruptcy judge or a district judge should resolve the factual issues in Count V. Despite ALPA's objections, there is nothing to prevent the Bankruptcy Court from deciding the issues posed in all counts of Eastern's complaint.

The policy of Chapter 11 is to permit successful rehabilitation of debtors, *N.L.R.B.* v. *Bildisco & Bildisco*, 465 U.S. 513, 527 (1984); the bankruptcy court is granted broad jurisdiction to promote that policy, and equitable power to protect that jurisdiction. Thus, the bankruptcy court has exclusive jurisdiction over the debtor's assets, 28 U.S.C. § 1334(d), proceedings threatening those assets are automatically stayed unless the bankruptcy court orders otherwise, 11 U.S.C. § 362, and the bankruptcy court may hear and decide claims against the debtor, 28 U.S.C. § 257(b) and (c), and may issue any order, process or judgment necessary to carry out its powers. 11 U.S.C. § 105(a); *In re Chateaugay Corp.*, 93 B.R. 26, 29 (S.D.N.Y. 1988).

However, 28 U.S.C. § 157(d) operates to some extent as a limitation on the exercise of those powers by a bankruptcy judge by authorizing withdrawal of a case or proceeding "in whole or in part" from the bankruptcy court to the district court "for cause shown," and requiring such withdrawal when "resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating . . . interstate commerce." ALPA asserts that the Bankruptcy Court may not hear and decide Eastern's complaint because that complaint raises several questions of federal law beyond the Bankruptcy Code. ALPA alleges that these questions must

be resolved in order to decide the claims in Eastern's complaint and therefore compel withdrawal pursuant to 28 U.S.C. § 157(d). But not all of the questions ALPA has conjured are unsettled, and even those that are do not generate answers that cast doubt on the Bankruptcy Court's authority to decide the underlying issues between the parties.

ALPA argues that among these unsettled questions is whether the anti-injunction provisions in Sections 4 and 7 of the NLGA, 29 U.S.C. §§ 104 and 107, prevent a bankruptcy court from enjoining an arbitration. Yet there is ample precedent to support the view that the NLGA bars only injunctions that limit or prohibit concerted labor activity or coercive conduct between parties to a labor dispute, not injunctions halting arbitration. *Menorah Home and Hospital* v. *Local 144*, 573 F. Supp. 908 (E.D.N.Y. 1983), *aff'd without op.*, 751 F.2d 370 (2d Cir. 1984); *Umeko. Inc.* v. *New York Coat, Suit, Dress, Rainwear & Allied Workers Union*, 484 F. Supp. 210 (S.D.N.Y. 1980); *American Broadcasting Companies* v. *American Federation of Television and Radio Artists*, 412 F. Supp. 1077 (S.D.N.Y. 1976).

ALPA argues further that no authority establishes the bankruptcy court's power to enjoin an arbitration mandated by the RLA, a federal statute outside the Bankruptcy Code. That limited proposition may be true, but there is authority recognizing a bankruptcy court's power to enjoin administrative proceedings under the National Labor Relations Act, *N.L.R.B.* v. *Superior Forwarding. Inc.*, 762 F.2d 695, 698 (8th Cir. 1985), and ALPA has not argued persuasively why that power should not extend to RLA arbitration on the facts of this case. Although ALPA did not raise the point, I do not believe *In re Goodman*, 873 F.2d 598, 603-04 (2d

Cir. 1989) requires a different result. In that case, the Second Circuit, *per* Judge Newman, read *Superior Forwarding* to authorize a bankruptcy court injunction against an administrative proceeding when the matter in dispute involved only contract interpretation and did not lie within the primary jurisdiction of the N.L.R.B., the administrative agency in question. Accordingly, the Second Circuit found no inconsistency between *Superior Forwarding* and its own holding that a bankruptcy court had no jurisdiction to enjoin an N.L.R.B. proceeding after the bankruptcy had terminated and the agency was in process of determining whether the bankrupt was the successor to entities that had committed unfair labor practices.

In this case, as in *In re Goodman*, at least that part of the dispute that involves ALPA grievances arguably involves simply contract interpretation. Eastern argues that there is no basis in the contract for the result ALPA seeks in arbitration, or indeed for arbitrating the dispute at all. A court would certainly have the authority to enjoin an arbitration if the position of the party seeking arbitration were frivolous. *Consolidated Rail Corp.* v. *Railway Labor Exec. Ass'n*, 109 S. Ct. 2477, 2482 (1989). ALPA has offered no reason why that authority may not be exercised by a bankruptcy court. *See In re Al-Cam Development Corp.*, 99 B.R. 573 (Bankr. S.D.N.Y. 1989). Moreover, here, unlike *In re Goodman*, the bankruptcy proceeding, a Chapter 11 reorganization, is ongoing, and the very pendency of the dispute inhibits presentation and adoption of a plan.[3]

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3. Apart from arising in a far different factual setting, *In re Goodman* itself cited the long established doctrine that "[f]ederal courts may decide labor

(continued...)

ALPA seems to allege that the Bankruptcy Court is incapable of applying the recent Supreme Court decision in *Trans World Airlines. Inc.* v. *Independent Fed'n of Flight Attendants*, 109 S.Ct. 1225 (1989). ("TWA v. IFFA") ALPA reads Eastern's complaint to suggest an over-broad application of that case, and then argues that the prospect of such an over-broad application poses a novel question that must be decided by an Article III judge. As should be clear in a moment, Eastern's complaint need not be read to prescribe a misapplication of *TWA* v. *IFFA*, but even if it did there is no reason to believe that the Bankruptcy Court cannot apply the case properly.

TWA v. *IFFA* holds only that the RLA does not compel a carrier to reinstate returning strikers in preference to junior personnel who worked during the strike. The opinion in that case does point out that the collective bargaining agreement between the parties contained no clause requiring such reinstatement, 109 S.Ct. at 1231, n.1, 1235, and thereby appears to acknowledge that union and management may contract to compel such reinstatement. Eastern's complaint alleges that ALPA is seeking in the proposed arbitrations to circumvent *TWA* v. *IFFA*. (*e.g.*, Complaint ¶¶ 34(b), 41) I read that allegation to say only that the contract between

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3. (...continued)
law questions that 'emerge as collateral issues in suits brought under independent federal remedies.'" 873 F.2d at 603, quoting *Communications Workers of America* v. *Beck*, 108 S.Ct. 2641, 2647 (1988). The Bankruptcy Code is certainly an "independent remedy," and labor law questions, to the extent they emerge, would appear to emerge as collateral issues in Eastern's action. That doctrine at least makes clear that the concept of primary jurisdiction itself must be harmonized with the demands of other federal statutes.

Eastern and ALPA contains no provision requiring such reinstatement, and that ALPA is therefore seeking to obtain in arbitration something it is not entitled to; I do not read it to suggest that *TWA* v. *IFFA* would prevent such a provision, implicit or explicit, from being enforced. *See Railway Labor Exec. Ass'n*, 109 S. Ct. at 2484-85 ("agreements may include implied as well as express terms"). But even if the complaint did suggest such an interpretation of *TWA* v. *IFFA*, reading the case and finding it does not say that is not a sacrament vouchsafed only to an Article III judge.

Finally, the union argues that to the extent Eastern seeks relief inconsistent with ALPA's view of the law, arguably in Counts I, III and V of the complaint, Eastern's suit raises issues that must be decided in the District Court. ALPA urges that Eastern is seeking improperly to validate after the fact steps it took unilaterally during the strike, including refusal to accept bids from striking pilots, refusal to recognize the seniority of striking pilots in preference to permanent replacements, and, in Count V of its complaint, implementation of work rules that lengthened the hours pilots could work. ALPA urges that although a struck carrier lawfully may take steps reasonably necessary to continue operations, even when those steps conflict with the terms of a collective bargaining agreement, no authority permits the carrier to act without securing court approval and such steps must be reversed immediately upon the termination of a strike. ALPA insists further that Eastern in any event is barred by the doctrine of unclean hands from taking such steps because it refused binding arbitration with the IAM before ALPA struck in sympathy with the IAM.

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Eastern's rights here are governed by *Brotherhood of Ry. & S.S. Clerks* v. *Florida East Coast Ry. Co.*, 384 U.S. 238 (1966), which holds that once a union is free to strike, a carrier is also free to rely on self-help by making unilaterally those contract changes "reasonably necessary" for continued operation. 384 U.S. at 244, 247-48. What is "reasonably necessary" or "truly necessary in light of [the particular facts of the case]," 334 U.S. at 248, is a factual matter well within the competence of a bankruptcy court. Indeed, it would seem that a bankruptcy court, familiar with the economic constraints operating on the carrier, is peculiarly well situated to decide what is "reasonably necessary" and what is not. Moreover, nothing in *Florida East Coast* holds that advance approval from a court must be secured. To the extent there is authority on that subject, it is to the effect that such approval is not generally necessary. *Railway Executives Ass'n* v. *Boston & Maine Corp.*, 639 F. Supp. 1092 (D.Me.), *modified on other grounds*, 808 F.2d 150 (1st Cir. 1986), *cert. denied*, 108 S. Ct. 102 (1987).

ALPA's argument that the protective steps otherwise proper under *Florida East Coast* must cease automatically and immediately upon termination of the strike that necessitates them, and that Eastern is seeking to justify continued violation of its contract, is answered by the language of *Florida East Coast* itself. If that case authorizes steps that are "reasonably necessary," then whether those steps may continue to have effects after the strike has ended, and if so for how long, itself should be determined by the standard of reasonable necessity. If the steps taken during a strike were reasonably necessary to assure continued operation, and they must inherently have effect beyond the duration of the strike, then *Florida East*

Coast would appear to authorize them even insofar as their effect extends beyond the duration of the strike.

Nor is ALPA's unclean hands argument persuasive. The RLA itself provides that a party's refusal to submit to arbitration "shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise." 45 U S.C. § 157, First. Moreover, as Eastern argues, *Florida East Coast* held that unclean hands would bar an order enjoining a strike, not temporary changes necessitated by the strike.

There is nothing to prevent the bankruptcy court from hearing and deciding the issues raised by Count V of Eastern's complaint. That Count seeks a declaration under *Florida East Coast* that Eastern's work rules changes, which were not the subject of any grievance or arbitration demand by ALPA, were "reasonably necessary." But there remains to be considered the question of whether the bankruptcy court's jurisdiction should override that of an arbitrator under the RLA and permit that court to decide the issues raised by Counts I through IV of Eastern's complaint, which have been the subject of grievances and arbitration demands.

V.

The dispute resolution procedures of the RLA, ending with final and binding arbitration, embody a strong policy in favor of arbitration and against litigation in court when the disputes arise out of interpretation of a collective bargaining agreement, as ALPA claims the disputes do here. That policy is justified by both the expertise of the arbitral tribunal and that tribunal's freedom from cumbersome procedures and appeals.

Union Pacific R. Co. v. *Sheehan*, 439 U.S. 89, 94 (1978), and cases cited therein. Although the RLA initially was created to deal with disputes in the railroad industry, it has been extended with certain modifications not here relevant to the airline industry, 45 U.S.C. § 181, and there is every reason to believe that the same justifications exist for the System Boards of Adjustment established for the airline industry, 45 U.S.C. § 184, as for the National Railroad Adjustment Board. 45 U.S.C. § 153, First. *See*, *Vaughter* v. *Eastern Air Lines, Inc.*, 619 F. Supp. 463, 467-69 (S.D. Fla. 1985), *aff'd* 817 F.2d 685 (11th Cir. 1987).

That strong policy in favor of arbitration, however, is not an end in itself. "The first declared purpose of the Railway Labor Act is 'To avoid any interruption to commerce or to the operation of any carrier engaged therein.'" *Slocum* v. *Delaware, Lackawanna & Western R. Co.*, 339 U.S. 239, 242 (1950), *quoting* 45 U.S.C. § 151a. The carrier in question in this case is now involved in a bankruptcy reorganization which, if not successful, will result in "interruption to commerce or to the operation of any carrier engaged therein" -- permanently. The disputes ALPA would arbitrate are "minor" disputes in the parlance of the RLA, because they grow out of interpretation of a collective bargaining agreement, 45 U.S.C. § 152, Sixth, as opposed to "major" disputes which involve disagreement in the attempt to change the terms of a collective bargaining agreement or in the bargaining process for a new contract. 45 U.S.C. § 152, Seventh; *Brotherhood of Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U.S. 30, 32 (1957). But despite their diminutive nomenclature under the RLA, ALPA concedes that these disputes involve potentially staggering cost to Eastern. At oral argument ALPA's counsel agreed that the outcome of these disputes "will determine

whether or not any reorganization is possible at all," (12/28/89 Tr. 22) and that potential damages involve "astronomical sums." (*Id.* at 23) Nor did ALPA contest Eastern's claim that uncertainty surrounding this dispute has inhibited Eastern from presenting a plan of reorganization; indeed, ALPA endorsed that claim. (*Id.* at 22-23)

In such circumstances, one of the advantages of arbitration when the employer is not in reorganization -- finality -- becomes a potentially devastating disadvantage. The only bases for review of arbitral decisions under the RLA are failure to comply with the requirements of the RLA, failure of the arbitral board to conform, or to confine itself to matters within the scope of its jurisdiction, and fraud or corruption. *Sheehan*, 439 U.S. at 93. No arbitrator can possibly be as aware as the bankruptcy judge supervising Eastern's reorganization of how that reorganization will be affected by an arbitral ruling. That presents the distinct possibility that even if ALPA prevailed at an arbitration it could find itself with an irreversible triumph over a carrier that then cannot be successfully reorganized -- precisely the Pyrrhic victory ALPA said at oral argument it wishes to avoid. (12/28/89 Tr. 33)

The other advantage of arbitration -- the familiarity of the arbitrator with the customs and usages of the industry -- is one that need not be lost entirely even if the underlying issues are decided in the Bankruptcy Court. There is no reason why ALPA could not find a way to submit to the Bankruptcy Court the arbitrator's views on any or all the issues in Eastern's complaint, assuming it wished to do so, particularly when there is only one arbitrator involved.

The union places substantial reliance on *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561 (1946), where the Supreme Court held that the bankruptcy court overseeing a railroad reorganization was obligated to refer to the Adjustment Board a jurisdictional dispute between two unions growing out of a disagreement as to the meaning of a collective bargaining agreement. *Pitney*, however, involved two elements not present here. First, because that case was a railroad reorganization it was controlled by the predecessor to 11 U.S.C. § 1167, which forbids the bankruptcy court to make any change in wages or working conditions "established by a collective bargaining agreement that is subject to the Railway Labor Act except in accordance with section 6 of such Act," *i.e.*, 45 U.S.C. § 156, which contains dispute resolution procedures. Section 1167, however, applies only to railroad reorganizations, not to airline reorganizations. 11 U.S.C. § 103(g); *Air Florida Pilots Ass'n* v. *Air Florida. Inc.*, 12 CBC 2d 661, 665 (Bankr. S.D.Fla. 1985). Second, the underlying dispute in *Pitney* was a jurisdictional dispute between two unions as to whose members would serve as conductors on trains within the railroad yard. Such a dispute could not threaten the reorganization of the debtor unless it continued and caused a strike or other disruption; its resolution either way could not cause such a threat, or indeed any economic threat. *Cf.*, *In re Marine pollution Service. Inc.*, 89 B.R. 344, 346 (S.D.N.Y.), *rev'd on other grounds*, 857 F.2d 91 (2d Cir. 1988). Here, by contrast, the economic stakes are enormous and bid fair to threaten Eastern's continued viability.

* * *

Appendix-A Opinion and Order of the United States District Court Southern District of New York

For the above reasons, the Bankruptcy Court should be free to decide all the remaining issues raised Eastern's complaint.

To recapitulate, ALPA's motion to withdraw is granted only insofar as questions of law are discussed and decided herein,[4] the motion to transfer is denied, and following such withdrawal the remainder of the proceeding is remanded to the Bankruptcy Court for decision.

SO ORDERED:

/s/ Michael B. Mukasey
Michael B. Mukasey,
U.S. District Judge

Dated: New York, New York
January 24, 1990

4. The matters treated in this opinion relate to ALPA's motion for mandatory withdrawal. ALPA has offered no reason for this Court as a matter of discretion to decide any issue raised in Eastern's complaint.

APPENDIX B

Opinion and Order of the United States District Court Southern District of New York

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

90 Civ. 0243 (MBM)

In re: Case Nos. 89 B 10448 (BRL)
89 B 10449 (BRL)

IONOSPHERE CLUBS, INC. and
EASTERN AIRLINES, INC.,

Debtors.

EASTERN AIRLINES, INC.,

Plaintiff,

-against-

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, EASTERN AIR LINE MASTER EXECUTIVE COUNCIL,

Defendant.

ADV. PRO. No. 90-5004A

Appendix-B Opinion and Order of the United States District Court Southern District of New York

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Opinion and Order of the Court

MICHAEL B. MUKASEY, U.S.D.J.

The Air Line Pilots Association, International ("ALPA"), after prevailing in an arbitration under the Railway Labor Act ("RLA") against Eastern Airlines, a debtor in possession under Chapter 11 of the Bankruptcy Code, sought to "confirm" the arbitral award by filing an action in the U.S. District Court for the Southern District of Florida. Eastern responded with an adversary proceeding in the Bankruptcy Court seeking (i) a declaration that ALPA's Florida action violated the automatic stay provisions of the Code, and (ii) an injunction barring further prosecution of that action.

Appendix-B Opinion and Order of the United States District Court Southern District of New York

ALPA now moves to withdraw Eastern's adversary proceeding from the Bankruptcy Court to the District Court pursuant to 28 U.S.C. § 157(d), which permits a bankruptcy court proceeding to be withdrawn to the district court "in whole or in part . . . for cause shown," and requires such withdrawal "if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." ALPA also seeks to transfer the withdrawn proceeding to the Southern District of Florida under 28 U.S.C. § 1404(a), which authorizes transfer of a case "[f]or the convenience of parties and witnesses, in the interest of justice . . . to any other district . . . where it might have been brought."

As set forth below, ALPA's motion to withdraw is denied. There is no reason to consider the transfer motion.

I

This proceeding adds a few more loops and knots to the tangled skein of labor proceedings between Eastern and ALPA that preceded, to some extent precipitated, and then followed Eastern's Chapter 11 filing on March 9, 1989. See, *e.g.*, *Air Line Pilots Ass'n Internat'l* v. *Eastern Air Lines. Inc.*, Nos. 89 Civ. 6989 and 7563 (RWS) (S.D.N.Y. April 9, 1990) slip op. 4-19, *Eastern Airlines, Inc.* v. *Air Line Pilots Ass'n Internat'l*, No. 89 Civ. 8250 (MBM) (S.D.N.Y. Jan. 24, 1990) slip op. 2-10. ("*Eastern* v. *ALPA*") ALPA represents certain current and former Eastern pilots. At the time of the Chapter 11 filing, ALPA was trying to drag Eastern before a panel of RLA arbitrators to resolve what was known as Case No. 5-86, in which ALPA charged that Eastern had violated pay parity

provisions when it failed to raise pilots' pay by the same percentages it had applied to raise the pay of employees represented by the International Association of Machinists ("IAM"). ALPA had been pressing the case, and Eastern resisting it, since 1986.

ALPA, acting out of what it now describes as "reasons of expediency" (Linsey Aff. 1/19/90 ¶ 16), moved in the Bankruptcy Court on July 10, 1989 for relief from the automatic stay imposed by 11 U.S.C. § 362[1] to allow Case No. 5-86 to proceed. On August 2, 1989, the Bankruptcy Court granted that relief, *In re Ionosphere Clubs, Inc.*, 105 B.R. 761 (Bankr. S.D.N.Y. 1989), and the case proceeded. On October 31, 1989, the System Board of Adjustment, established as the arbitral tribunal under the RLA, 45 U.S.C. § 184, handed down a decision that both parties regard as favorable to ALPA. (Linsey Aff. 1/19/90 Exh. 15)

On November 22, 1989 ALPA filed an action in the Southern District of Florida seeking an order confirming the arbitral award, a declaratory judgment including a computation of amounts payable under the award, and attorneys' fees and costs as compensation for Eastern's long-term resistance to the RLA arbitration. Acting out of what it suggests was a concern for Eastern's Chapter 11 status, ALPA stopped short of seeking to compel Eastern to disburse back pay. (Linsey Aff. 1/19/90 Exh. 17 and ¶ 21) Eastern responded on January

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1. That section provides in relevant part that a debtor's petition "operates as a stay . . . of -- (1) the . . . continuation . . . of . . . [an] administrative . . . proceeding against the debtor that was or could have been commenced before the commencement of the case under this title . . . ."

4, 1990 by filing an adversary proceeding in the Bankruptcy Court seeking (i) a declaration that ALPA's Florida action violated the automatic stay, (ii) an injunction ending the Florida action and preventing any further such action, and (iii) a finding that the arbitral award had exceeded the System Adjustment Board's jurisdiction in that it compelled parity with IAM pay raises allegedly beyond those submitted for arbitration. (Linsey Aff. 1/19/90 Exh. 16 at ¶ 4) ALPA seeks here to withdraw and transfer that proceeding.

II

ALPA perceives two issues that compel withdrawal under 28 U.S.C. § 157(d). One is whether its Florida action may be enjoined consistent with the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. § 104 and 107; the other is whether a court may determine what ALPA styles issues of "procedural arbitrability" under the RLA. To the extent ALPA relies on a view of the statute that would apply it broadly to any controversy calling for the straightforward application of a statute outside Title 11, I adhere to the views expressed in *Eastern* v. *ALPA*, *supra*, slip op. at 10-12, based on the authority there cited as well as Judge Sweet's opinion in *O'Connell* v. *Terranova*, No. 89 Civ. 7203 (RWS) slip op. at 2-5 (S.D.N.Y. March 21, 1990).

The first of ALPA's arguments for withdrawal is covered by my January 24, 1990 opinion in *Eastern* v. *ALPA*, slip op. at 15-17, which dealt with whether the prospect of an injunction against an RLA-mandated arbitration required withdrawal. That decision applies *mutatis mutandis* to the Florida court action here. To the extent that the Fourth Circuit's opinion in *District 29, United Mine Workers* v. *New Beckley Mining Corp.*,

895 F.2d 942 (4th Cir. 1990) differs from my earlier decision and the authority there relied on, I respectfully decline to follow it and believe that Judge Sprouse's dissent at 895 F.2d 947-49 expresses the better view.

The second issue ALPA perceives to justify withdrawal is a mirage, perhaps of its own creation and perhaps of Eastern's but in any event illusory and insufficient to justify withdrawal. ALPA argues that the question of whether the arbitrators exceeded their jurisdiction, which Eastern has raised in its Bankruptcy Court complaint, involves "procedural arbitrability," and must be decided by the arbitrators themselves and not by a court, and that Eastern is engaged in an unprecedented attempt to have a court decide it, which presents a novel issue under the RLA. As noted in *Eastern* v. *ALPA*, *supra*, slip op. at 22-23, arbitral decisions under the RLA are subject to court review by the terms of the statute itself, 45 U.S.C. § 153 First (q), *inter alia* for "failure of the Adjustment Board to conform, or confine, itself to matters within the scope of its jurisdiction . . . ." *Union Pacific R. Co.* v. *Sheehan*, 439 U.S. 89, 93 (1978), *reh'g denied* 439 U.S. 1135 (1979). With the statute to provide guidance, there is no need to explore such an otherwise intriguing concept as procedural versus substantive arbitrability. *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 555-56 (1964).

Moreover, as the Supreme Court made clear and explicit in *Sheehan* and elsewhere, the statutory segment quoted above is one of "three limited categories of review provided for in the Railway Labor Act." *Sheehan* at 93. That being so, the Bankruptcy Court's task will be limited to deciding what may fairly be characterized as an issue of law, *id.*, which will

receive plenary review on appeal. *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 193 (1963).

When all of the above facts are considered, it would appear that the best of all possible results from everyone's standpoint is to permit this matter to proceed in the Bankruptcy Court. That Court is in the best position to determine how much leeway it granted ALPA when it agreed to lift the stay and permit Case No. 5-86 to proceed. Moreover, any decision about whether the arbitrators exceeded their authority will require only straightforward application of the statutory standards of the RLA, which have been explicated and applied frequently, and will be fully reviewable on appeal.

These facts and issues do not justify either a mandatory or a discretionary withdrawal of Eastern's adversary proceeding from the Bankruptcy Court. Accordingly, ALPA's motion to withdraw is denied and its motion to transfer is dismissed as moot.

SO ORDERED:

/s/ Michael B. Mukasey
Michael B. Mukasey,
U.S. District Judge

Dated: New York, New York
April 30, 1990

APPENDIX C

Opinion and Order of the United States District Court Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M-47

In re

FINANCIAL NEWS NETWORK, INC.,

Debtor.

Appeal of

DOW JONES/GROUP W TELEVISION COMPANY, DOW JONES & COMPANY, INC. and WESTINGHOUSE BROADCASTING COMPANY, INC.

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Appendix-C Opinion and Order of the United States District Court Southern District of New York

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Appendix-C Opinion and Order of the United States District Court Southern District of New York

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Appendix-C Opinion and Order of the United States District Court Southern District of New York

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Appendix-C Opinion and Order of the United States District Court Southern District of New York

LASKER, D.J.

These are expedited appeals from a decision reached by the Bankruptcy Court for the Southern District of New York on April 3, 1991 in the Chapter 11 proceedings of Financial News Network, Inc. ("FNN"). *In re Financial News Network, Inc.*, 91 B 10891 (FGC).

The Bankruptcy Court ruled orally on that date that any antitrust objections or actions by the Federal Trade Commission (FTC) or state agencies to bar the proposed acquisition of FNN must be brought before the Bankruptcy Court. That ruling is appealed by the FTC, the Commonwealth of Pennsylvania and the State of Delaware, acting for themselves and thirteen other states (collectively the "States"). The appeals are opposed by the Consumer News and Business Channel partnership (CNBC) and by FNN.[1]

The court's ruling was formally entered by the Bankruptcy Court in an Order and Judgment dated April 16. Oral argument on the appeal was heard on April 16 shortly before entry of the formal order, and was based on the Bankruptcy Court's extensive comments made in connection with its April 3 rulings.

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1. At the April 3 proceeding, the Bankruptcy Court also ruled that the bid of Dow Jones/Group W for FNN's assets would not be considered as a qualified bid because it failed to comply with the court's requirement that all bids conform to the terms of an offer previously submitted by CNBC in all respects other than price. That decision was also appealed (by Dow and by FNN's creditors) and argued at the same proceeding as the FTC's appeal. The court's refusal to consider Dow's bid is treated in a separate opinion dated April 17, 1991.

Appendix-C Opinion and Order of the United States District Court Southern District of New York

For the reasons discussed below, the Bankruptcy Court's ruling as to its jurisdiction is affirmed.

I.

Because there is no significant dispute as to the facts underlying the decision below or its appeal, and because of the time constraints governing resolution of the appeal, this opinion assumes familiarity with that background and provides no discussion of those facts beyond those needed to support particular conclusions.

The standard of review on this appeal, as on any appeal from the decision of a Bankruptcy Judge, is that the factual determinations below are binding unless clearly erroneous, while conclusions of law are reviewable *de novo*. *See In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 988-89 (2d Cir. 1990).

II.

The question giving rise to this appeal is the disposition of assets of the debtor FNN, which has been operating under Chapter 11 of the Bankruptcy Code since March 1, 1991. Two bids for those assets were presented to the Bankruptcy Court, one by a partnership known as Dow Jones/Group W ("Dow"), the other by CNBC, which now is FNN's sole competitor in the cable television business news industry. The Court ruled that Dow's bid did not comply with its announced rules governing bids for FNN, and therefore refused to consider Dow's bid and accepted CNBC's bid.

The instant appeals challenge the Bankruptcy Court's ruling that "any entity seeking to enjoin the consummation of the

transactions approved herein based upon matters that have been solely before this court must commence such action in this Court; *provided, however*, that such commencement shall be without prejudice to the rights afforded pursuant to 28 U.S.C. § 157(d)." Order and Judgment ¶ V (emphasis in original). The court's ruling was based in its finding that "any attempt to enjoin the transactions contemplated by the Motion and the Agreement in any other court [] would violate the automatic stay extant pursuant to section 362(a) of the Bankruptcy Code." Order and Judgment ¶ 3.

The FTC argues that the automatic stay provision of 11 U.S.C. § 362(a) cannot reach the FTC's authority to seek to enjoin contemplated mergers. It notes that 11 U.S.C. § 362(a) provides for stays of actions against the debtor in bankruptcy court, while its action would instead be brought against the acquiring entity, in this case CNBC. As to section 362(a)(3)'s stay of actions regarding control of the debtor, FTC argues that that provision has been construed to apply solely to creditor claims against the debtor's assets. FTC additionally argues that section 362(b)(4) exempts regulatory actions from the automatic stay provisions of section 362(a). Finally, FTC argues that it never submitted to the bankruptcy court's jurisdiction by appearing before it, but rather appeared for the sole purpose of seeking an extension of time for its review of the proposed merger pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Section 7A of the Clayton Act, 15 U.S.C. § 18a.

CNBC, which filed extensive papers opposing the motions of the FTC and the states, contends that the appeal is premature because it preceded entry of a written order implementing the court's rulings of April 3. As is discussed

more fully in our opinion addressing the exclusion of Dow's bid from consideration, however, this objection fails for two reasons. First, the court's determination was sufficiently final, explicit and detailed to permit meaningful review, particularly in light of precedent favoring flexible application of the finality requirement in bankruptcy appeals. *See In re Johns-Manville Corp.*, 920 F.2d 121, 126 (2d Cir. 1990) ("The finality requirement is less rigidly applied in bankruptcy than in ordinary civil litigation, and 'orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the larger case'"). Second, a written order was in fact entered within hours of argument of the appeal. The written order has been provided to the court, and neither our review of it nor any communication from the parties suggests it contains anything that would alter the substance of the April 16 argument or of this court's opinion. Indeed, in its Order of April 16, the court stated: "This order is entered to ensure that any party contemplating an appeal, even if interlocutory, will have an order to appeal from." Order and Judgment ¶ 2. Accordingly, the filing of the Order moots CNBC's objection as to the finality of the judgment being appealed.

As to the merits, the parties have presented extensive arguments on the important question of the intersection of the Bankruptcy Court's jurisdiction over matters affecting disposition of the debtor's estate and the FTC's statutory authority to enforce the nation's antitrust laws in the forum of its choice, as well as the States' independent authority to enforce their antitrust laws.[2] However, that issue need not be

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2. The parties do not contest the Bankruptcy Court's competence to hear antitrust matters related to pending bankruptcy cases. The Bankruptcy (continued...)

reached because the Bankruptcy Court found that both the FTC and the States have, through their extensive involvement in the proceedings below, submitted themselves to the jurisdiction of the Bankruptcy Court for purposes of this case, and that finding is at a minimum not clearly erroneous. While the FTC contends that its sole appearance before the Bankruptcy Court was for the limited purpose of seeking an extension of time to complete its review pursuant to the Hart-Scott-Rodino Act, in fact its involvement was far more pervasive, as was that of the States.

The Bankruptcy Code provides that when disposition of the debtor's assets requires notification under the Hart-Scott-Rodino Act,

> (A) notwithstanding subsection (a) of such section, such notification shall be given by the trustee; and
>
> (B) notwithstanding subsection (b) of such section, the required waiting period shall end on the tenth day of the receipt of such notification, unless the court, after notice and hearing, orders otherwise.

11 U.S.C. § 363(b)(2). Thus the FTC was obliged to appear before the Bankruptcy Court in order to obtain any extension of the ten-day Hart-Scott-Rodino review period. An

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2. (...continued)
Court's authority to hear such cases derives from 28 U.S.C. § 157(a) (authorizing the reference of cases under the Bankruptcy Code and related proceedings to bankruptcy judges) and § 157(b)(2)(O) (Defining core proceedings to include "proceedings affecting the liquidation of the assets of the estate . . .").

appearance for the sole purpose of obtaining an extension on the review period may not constitute a consent to the Bankruptcy Court's jurisdiction over any antitrust challenge that may ultimately result from the FTC's review.

However, the FTC in its actual appearances did more than merely request an extension.

On March 14, the FTC requested that the Bankruptcy Court withhold approval of the Motion and Agreement until twenty days after FNN and CNBC provided additional information to FTC concerning the proposed merger. FTC indicated that it would advise the court as to its findings. At a March 27 hearing on FNN's "Emergency Motion" seeking to advance the auction date of FNN's operations to April 3, FTC made an appearance to oppose that motion. Finally, at the April 3 hearing and auction the FTC appeared again and participated in discussion of the auction's conduct.

The States similarly played a substantial role in the proceedings below, and thereby submitted themselves to the Bankruptcy Court's jurisdiction. On March 25 the States filed an objection to the proposed sale to CNBC, arguing that the sale likely would violate antitrust laws and requesting the Bankruptcy Court to disapprove the sale to CNBC and to refuse to consider any bid from CNBC at a future auction of FNN's assets. The States further urged that the court insist that the ultimate purchaser of FNN operate the business separately from CNBC. Again on March 27, the States opposed by letter an FNN's "Emergency Motion" to advance the auction of its broadcast operations to April 3. And at the April 3 auction the States voiced their continued objections to the CNBC bid, maintaining that because of the substantial

likelihood of antitrust liability resulting from CNBC's possible acquisition of FNN, CNBC's was not the "highest and best bid" before the court.

The extent of participation by the FTC and the States was noted by the Bankruptcy Court, which found that through their participation they "have consented to the jurisdiction of this Court to consider the Motion and all matters relating thereto, including, without limitation, any attempts to enjoin or otherwise interfere with the Closing . . . ." Order and Judgment ¶ 52.

The bankruptcy court is legally competent to resolve antitrust issues raised by proceedings before it, and has entertained throughout those proceedings the comments of the FTC and the States. While those entities now protest that they never consented to the Bankruptcy Court's jurisdiction over their claims, by their earlier appearances they in fact attempted to prevent the Court's award of FNN to CNBC, and based their objections on antitrust concerns arising from their investigation of the proposed merger. Only upon an unfavorable ruling below did they seek to disassociate themselves with the pending bankruptcy proceedings.

It is unnecessary, in the circumstances of this case, to determine whether a mere appearance before a Bankruptcy Court to seek an extension of time for review pursuant to the Hart-Scott-Rodino Act would subject the FTC to the exclusive jurisdiction of that court. Today's ruling is based on the specific facts of this case, in which the FTC and the States each attempted to influence the proceedings by presenting antitrust objections to the Bankruptcy Court. The court below rightly noted that the FTC and the States retain the ability to

seek withdrawal of the reference either of the entire proceeding or its antitrust components to the District Court. Once these entities have submitted to the court's jurisdiction, that is their sole remedy.

This result is consistent with the purpose of allowing the Bankruptcy Court broad jurisdiction over matters concerning the disposition of the debtor's assets. It is not contrary to public opinion granting antitrust enforcement agencies discretion over the forum in which to seek relief because if the sale is consummated the FTC and the States retain the ability to sue in the forum of their choice to bring about divestiture.

The ruling of the Bankruptcy Court is affirmed.

Dated: New York, New York
April 18, 1991

/s/ Morris E. Lasker
Morris E. Lasker,
U.S. District Judge